



FEDERAL ELECTION COMMISSION

Washington, DC 20463

JUN 20 2 34 PM '96

AGENDA ITEM
For Meeting of: **JUN 27 1996**

June 20, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Paul S. Sanford
Rita Reimer
Staff Attorneys

SUBJECT: Draft AO 1996-24

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 27, 1996.

Attachment

DRAFT

1 CERTIFIED MAIL
2 RETURN RECEIPT REQUESTED

3
4 ADVISORY OPINION 1996-24

5
6 John DiLorenzo, Jr.
7 Hagen, Dye, Hirschy & DiLorenzo, P.C.
8 Attorneys at Law
9 19th Floor Benj. Franklin Plaza
10 One SW Columbia Street
11 Portland, OR 97258-2087

12
13 Dear Mr. DiLorenzo:

14
15 This responds to your letter dated May 13, 1996, as supplemented by your letter dated
16 May 22, requesting an advisory opinion on behalf of U. S. Representative Wester S. Cooley
17 and his authorized campaign committee regarding application of the Federal Election
18 Campaign Act of 1971, as amended ("FECA" or "the Act"), to the use of campaign funds to
19 pay certain legal expenses.

20 Your law firm represents Mr. Cooley and his authorized campaign committee. Your
21 letters indicate that Mr. Cooley has recently been the subject of press allegations regarding
22 his conduct, and that your law firm has provided various advisory services (as to both legal
23 and political issues) to Mr. Cooley in connection with these allegations. Mr. Cooley wishes
24 to use campaign funds to defray some or all of the fees and expenses associated with these
25 services. You ask whether this would be permissible under the Act and Commission
26 regulations.

27 Your letters indicate that allegations have been made about Mr. Cooley regarding (1)
28 statements made in voter pamphlets regarding the date of his marriage; (2) county building
29 permit requirements; (3) the receipt of Veterans benefits; (4) tax benefits received under a

1 farm land tax deferral program; (5) tax deductions claimed for dependents living on Mr.

2 Cooley's ranch; and (6) statements made about his war record.

3 You further state that all of these allegations have become campaign issues.

4 Your May 13 letter lists 22 services you have provided to Mr. Cooley. Your May 22
5 letter provides additional information on some of these services. The services include:

- 6 1. Preparation of affidavits relating to information for release to the press;
- 7
- 8 2. Communication with the press and, in particular, fielding press inquiries
- 9 concerning allegations involving the Congressman;
- 10
- 11 3. Research on Oregon law relating to defamation and retractions for false
- 12 statements made in the press;
- 13
- 14 4. Drafting and revision of press releases;
- 15
- 16 5. Demands for retraction of false statements made in various newspaper articles
- 17 relating to the Congressman;
- 18
- 19 6. Research regarding establishment of a legal defense trust fund and the
- 20 applicability of the Act and Commission regulations thereto;
- 21
- 22 7. Drafting of the legal defense trust fund agreement;
- 23
- 24 8. Representation of the Congressman in a legal proceeding in which a newspaper is
- 25 attempting to obtain confidential information;
- 26
- 27 9. Research regarding county building permit requirements to respond to newspaper
- 28 allegations of wrongdoing relating to the Congressman;
- 29
- 30 10. Research regarding laws and Veterans Administration [Department of Veterans
- 31 Affairs] regulations regarding the receipt of Veterans Administration benefits to
- 32 respond to newspaper allegations of wrongdoing relating to the Congressman and
- 33 his spouse;
- 34
- 35 11. Review of daily news clippings;
- 36
- 37 12. Political advice given to the Congressman;
- 38

- 1 13. Research regarding the disclosability of certain information under the Freedom of
2 Information Act;
- 3
- 4 14. Research regarding Oregon law relating to other newspaper allegations
5 concerning the Congressman;
- 6
- 7 15. Communication with the Veterans Administration [Department of Veterans
8 Affairs] directly related to an inquiry requested by the Congressman into
9 newspaper allegations concerning the Congressman and his spouse;
- 10
- 11 16. Conversations with various office holders and political activists regarding
12 campaign strategy and responding to allegations made by the media;
- 13
- 14 17. Factual investigations relating to newspaper allegations of wrongdoing by the
15 Congressman;
- 16
- 17 18. Communications with the House Committee on Standards of Official Conduct
18 and with the Commission regarding the establishment of a legal defense fund and
19 the use of campaign funds for legal and other expenses;
- 20
- 21 19. Research regarding the use of campaign funds for legal expenses;
- 22
- 23 20. Research regarding the Oregon tax deferral for farm land in response to
24 newspaper allegations relating to the Congressman;
- 25
- 26 21. Discussions with county tax officials to respond to and demand a retraction from
27 the newspapers which alleged wrongdoing by the Congressman culminating in a
28 retraction by the Bend Bulletin newspaper;
- 29
- 30 22. Conferences with the Congressman and his spouse regarding the above matters.
- 31

32 For convenience, these services are grouped by category in the following discussion.

33 The majority of these services can be characterized as efforts to respond to the press
34 allegations made about Mr. Cooley. These services generally fall into three categories: (a)
35 direct communications with the press, including responses to press inquiries concerning Mr.
36 Cooley's positions on the allegations made; (b) research, investigations and communications
37 with government officials directed at refuting the allegations made; and (c) research on

1 Oregon law relating to defamation and false statements made by the press, and subsequent
2 demands for retractions of false statements. They also include researching the possibility of
3 establishing a legal defense trust fund on Mr. Cooley's behalf, and representing Mr. Cooley
4 in legal proceedings in which a newspaper is attempting to obtain confidential information.

5 As your correspondence notes, the Commission has historically recognized that
6 candidates have wide discretion in making expenditures to influence their election. See, e.g.,
7 Advisory Opinion 1995-42. However, the Act at 2 U.S.C. §439a prohibits the conversion of
8 campaign funds to personal use. Commission regulations at 11 CFR 113.1(g) define personal
9 use for the purposes of this prohibition. Generally, personal use is any use of funds in a
10 campaign account of a present or former candidate to fulfill a commitment, obligation or
11 expense of any person that would exist irrespective of the candidate's campaign or duties as a
12 Federal officeholder. The rules list certain uses of campaign funds that will be considered
13 *per se* personal use. Other uses of campaign funds will be examined on a case by case basis
14 using the general definition of personal use. 11 CFR 113.1(g)(1).

15 Your law firm serves as legal counsel to Mr. Cooley and his authorized campaign
16 committee. Under the personal use rules, expenses for attorney services are among those
17 uses that will be examined on a case by case basis using the general definition of personal
18 use. 11 CFR 113.1(g)(1)(ii)(A). Thus, the use of campaign funds for attorney fees and
19 expenses ("legal expenses") that would exist even if Mr. Cooley were not a candidate or
20 Member of Congress would be a conversion to personal use. Conversely, the use of
21 campaign funds to pay legal expenses that would not exist absent his candidacy or
22 officeholder status would be permissible.

1 Ordinarily, legal expenses associated with marriage, county building permit
2 requirements, the receipt of Veterans benefits, farm land tax deferrals and other tax
3 deductions would be considered personal in nature, since, standing alone, these matters are
4 unrelated to campaign or officeholder activity. However, the need for the services you have
5 provided appears to have arisen only indirectly out of the cited matters themselves. Instead,
6 the services result more directly from the need for the campaign to respond to allegations of
7 wrongful conduct related to these matters that appeared in the press during Mr. Cooley's past
8 and current Congressional election campaigns.

9 Although these expenses could be incurred by any person who is subjected to similar
10 allegations, and in that sense could exist irrespective of candidacy or officeholder status, the
11 Commission recognizes that the activities of candidates and officeholders may receive
12 heightened scrutiny and attention because of their status as candidates and officeholders. The
13 obvious need for a candidate to respond to allegations that result from this elevated scrutiny
14 would not exist irrespective of the candidate's campaign or officeholder status. The
15 Commission approved the use of campaign funds to pay certain specific legal expenses
16 incurred in connection with a campaign in Advisory Opinions 1995-23 and 1995-21.¹

17 Consequently, the Commission concludes that if allegations of improper or wrongful
18 conduct are made about a candidate in a campaign context, the candidate is entitled to use
19 campaign funds for the purpose of publicly responding to those allegations, even if the
20 underlying activities that are the subject of the allegations were not campaign or officeholder

¹ Advisory Opinion 1995-23 authorized a candidate who had been charged with illegally taking down his opponent's campaign signs to use campaign funds to pay the cost of his defense. Advisory Opinion 1995-21 authorized a campaign committee to use campaign funds to challenge a sheriff's office's seizure of committee property to enforce a prior debt against the candidate.

1 related. This conclusion enables Mr. Cooley to use campaign funds for the expenses
2 associated with your efforts to respond to the press allegations that fall into categories (a),
3 (b), and (c), described above, subject to the limitation described below. Specifically, this
4 allows Mr. Cooley to use campaign funds to pay for expenses numbered 1 through 5, 9
5 through 11, 14, 15, 17, 20 and 21.

6 The Commission regards it as significant that your efforts to respond to these press
7 allegations appear to have been limited to attempting to refute them. With one exception to
8 be discussed below, your letters state that there are no pending legal proceedings regarding
9 any of the matters that have been the subject of the press allegations. Thus, Mr. Cooley does
10 not appear to propose the use of campaign funds for legal expenses incurred to rectify,
11 remedy, or present a legal defense to, possible liabilities or violations of law that are
12 unrelated to his campaign or officeholder status.

13 The possible exception relates to items 10 and 15, involving Mr. Cooley's request for
14 an inquiry by the Department of Veterans Affairs ("VA") into the allegations regarding his
15 spouse's receipt of Veterans benefits. By itself, Mr. Cooley's request for an inquiry could be
16 regarded as an attempt to confirm that he has complied with the law and, therefore, as an
17 effort to refute press allegations made during the course of his campaign. However, if this
18 inquiry results in an adverse finding or determination by the VA regarding the receipt of
19 Veterans benefits, any efforts to respond to such a finding or determination would be treated
20 differently. The need to respond to such a finding would arise not out of press allegations of
21 misconduct, but out of the Cooleys' obligation to comply with the eligibility requirements for
22 receipt of Veterans benefits, an obligation that would exist irrespective of Mr. Cooley's status

1 as a candidate or a Federal officeholder. Thus, the use of campaign funds for expenses
2 incurred in responding to the VA's finding, such as by presenting a legal defense, attempting
3 to reach a financial settlement, or rectifying noncompliance by returning benefits previously
4 received, would be a conversion to personal use. This would be true even if the VA
5 discovered the facts upon which its findings are based solely as a result of the press
6 allegations and Mr. Cooley's subsequent request for an inquiry, because, notwithstanding the
7 reason for the discovery, the obligation to comply with VA eligibility requirements would
8 exist even if Mr. Cooley were not a candidate or officeholder.

9 The Commission notes that other allegations addressed in your request may, in time,
10 also lead to legal proceedings that could have arisen irrespective of Mr. Cooley's status as a
11 candidate or officeholder. Under the same reasoning set forth above, Mr. Cooley could not
12 use campaign funds to pay the costs incurred in connection with any such proceeding.

13 On the other hand, your supplemental letter indicates that the Oregon Secretary of
14 State is investigating press allegations that Mr. Cooley's 1994 voter pamphlet contained
15 inaccuracies relating to his war record, although there are no formal proceedings pending at
16 this time. Since the alleged false statements were made in voter pamphlets Mr. Cooley
17 produced in the course of his campaign for Congress in 1994, he may use campaign funds for
18 any expenses incurred in the course of this investigation.

19 In addition to your efforts to respond to the press allegations, you have also provided
20 other services to Mr. Cooley. Numbers 6, 7, 18 and 19 of your May 13 letter involve
21 research, drafting and communications associated with the establishment of a legal expense
22 trust fund, and other research regarding the use of campaign funds for legal expenses. Legal

1 expense trust funds provide candidates and Members of Congress with a mechanism for
2 receiving donations to defray their legal expenses without having those donations treated as
3 contributions under the Act. Thus, the expenses of establishing such a fund would not be
4 incurred if Mr. Cooley were not a candidate or officeholder. This is also true of expenses for
5 research regarding the use of campaign funds for legal expenses. Therefore, Mr. Cooley may
6 use campaign funds to pay these expenses.

7 Number 8 involves representation you provided to Mr. Cooley in a proceeding in
8 which a newspaper is trying to obtain confidential information. Number 13 involves research
9 regarding the disclosure of information under the Freedom of Information Act. The
10 Commission has considered these activities and concludes that it has insufficient information
11 to determine whether the use of campaign funds for these expenses would be permissible
12 under the Act. You have indicated that your ability to provide additional information is
13 limited by your confidentiality obligations to your client. Therefore, the Commission
14 expresses no opinion regarding the permissibility of using campaign funds for these
15 expenses.

16 Numbers 12 and 16 involve providing political or campaign advice to Mr. Cooley,
17 and communication with other officeholders and political activists regarding strategy for
18 responding to the allegations made by the media. Since the advice you provided and the
19 strategic communication you engaged in were part of your efforts to respond to the media
20 allegations during Mr. Cooley's candidacy for Congress, Mr. Cooley may use campaign
21 funds for the expenses associated with these activities.

1 In number 22, you refer to conferences with both Mr. Cooley and his spouse
2 regarding the various matters described in your letter. The use of campaign funds for the
3 expenses associated with these conferences is permissible to the extent that the conferences
4 involved discussions of the press allegations made during Mr. Cooley's Congressional
5 campaigns. This would include discussions of press allegations of wrongful conduct by Mr.
6 Cooley's spouse, since her alleged improprieties also appear to have become issues in his
7 reelection campaign.

8 However, this would not include conferences for the purposes of discussing any
9 adverse findings or determinations made by the Veterans Administration regarding Veterans
10 benefits. Nor would it include conferences to discuss other efforts to rectify, remedy, or
11 present a legal defense to, possible liabilities or violations of law that are unrelated to Mr.
12 Cooley's status as a candidate or officeholder. Since these matters would exist irrespective
13 of Mr. Cooley's status, the use of campaign funds for conferences to discuss these matters
14 would be personal use.

15 Finally, the Commission notes Mr. Cooley's assertion that these expenses are
16 campaign-related because they are tied to his status as a candidate who is actively seeking re-
17 election.² The Commission expresses no opinion on any use of campaign funds for legal
18 expenses that are incurred at a time when Mr. Cooley is not seeking election to Federal
19 office. The Commission would consider the use of campaign funds for post-campaign legal
20 expenses in response to another advisory opinion request that fully describes the specific
21 purposes and circumstances of the services provided.

² Mr. Cooley won the Republican nomination to retain his seat in the May 21, 1996, Oregon primary election.

The cost of legal expenses consistent with this advisory opinion should be reported as an operating expenditure by the Committee, with the purpose noted. See 11 CFR 104.3(b)(2) and (b)(4)(i); see also Advisory Opinions 1995-23 and 1995-21.

The Commission expresses no opinion as to the possible applicability of state and Federal tax or other laws, or rules of the House of Representatives, to the matters presented in your request, since those issues are not within its jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Lee Ann Elliott
Chairman

Enclosures (AOs 1995-42, 1995-23, 1995-21)